

BOOK REVIEW

Triangulating the Administrative State

ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY. By Christopher F. Edley, Jr.[†] New Haven, Connecticut: Yale University Press, 1990. Pp. xiii, 270. \$30.00 cloth.

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Arguing that the courts should promote "sound governance," Professor Christopher Edley's *Administrative Law* takes the first few steps on the road toward a much needed reformulation of the field. Much of the book involves a critique of the traditional categories of administrative law—what Edley calls the "trichotomy"—namely, the concepts of adjudicatory fairness, science, and politics, and the corresponding institutional analogues of court, agency, and legislature. This triadic structure of administrative law, Edley argues, ultimately "gets in the way of clear thinking and forthright explanation" (p. 11).

According to Edley, judicial review of administrative actions focuses on a futile search for a formula to determine when deference is appropriate (p. 96). Oddly, although Congress chooses to delegate broadly in the first place "because everyone concedes Congress's institutional inability to get involved in the details" (pp. 97-98), courts justify deference on the ground that "Congress will fix things" (p. 97). Edley argues that in many circumstances the doctrinal categories tend to merge, "making it even more difficult to use them as the basis for scaling judicial deference" (p. 101). Thus, he concludes that the judiciary's attempt to assign issues to courts, agencies, or legislatures is an empty taxonomic exercise.

While it is easy enough to support a shift from unhelpful doctrinal categories to a more principled approach, it is quite another thing to articulate that approach persuasively. Anachronistic categories can be a convenient way of disguising fundamental normative disputes. Edley himself recognizes that "[s]uch terms as *arbitrary*, *abuse of discretion*, and *substantial evidence* must be defined with reference to the decision making paradigm under examination; the definitions cannot be determinative if the paradigm is itself poorly discerned and inadequately specified" (p. 114).

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Only in the last chapter does Edley believe that he has "earned the right to speculate" (p. 213) and proposes sweeping changes in the institution of judicial review to promote "sound governance." He is, however, rather vague about what sound governance entails, expressing hope that "continuing dialogue among the branches" will lead to "the evolution of norms" (p. 236), and echoing Judge Wright's belief that the "'ultimate test of the Justices' work . . . must be goodness'" (p. 235).¹ Yet Edley's formulation is not completely open-ended. He seems to be a policy analyst at heart, supporting training in economic analysis for judges (p. 239)² and approving judicial remands to agencies to conduct cost-benefit analyses (p. 232). He supports disclosure, wide participation, agency discretion, and multiple decisionmaking fora (pp. 262-64).

I

THE TRICHOTOMY

Edley's trichotomy encompasses the familiar administrative law categories of adjudicatory fairness, science, and politics. It is a commonplace of administrative law that modern public agencies incorporate all three decisionmaking paradigms. Yet, as Edley points out, the courts view agencies as best suited to find facts because "such determinations are the product either of scientific or expert inquiry and judgment or of an assimilation of detailed and varied evidence or experience, for which the agency is particularly well qualified by virtue of its bureaucratic organization of resources" (pp. 31-32, 100). The judiciary attempts to police the boundary between the agencies and the courts, and the boundary between the agencies and the legislature, relying on the courts' and legislature's assumed competence in law and politics, respectively. This policing effort, Edley argues, is doomed to failure (pp. 80-83).

Previous efforts to provide prescriptive frameworks for administrative law are, according to Edley, also inadequate. He groups these previous efforts into three categories: rule of law/legal process, politics and interest accommodation, and expertise and ideal administration (pp. 133-62). He also discusses a fourth perspective which relies on "pragmatism" and eschews any attempt at conceptualization (pp. 162-68). All these previous commentaries fail to address the flaws of the trichotomy. The first does not adequately come to terms with either the role of politics or expertise in agency decisionmaking (p. 143). The second distorts agency activities, seeing them only through the "prism of politics" (p. 153). For example, Edley argues that:

1. Quoting Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 797 (1971).

2. Edley notes, "I admit that it does little good to decry, as I do, the unwillingness of courts to probe for shoddy policy science if the court cannot tell it when it sees it" (p. 57).

a dispute about the importance of a risk posed to the Hudson River fish by construction of a power facility³] might be thought of as the subject for a political contest between environmental, consumer, and industry interests, as a scientific issue for careful study by biologists and cost-benefit analysts, or as an issue for adjudicatory law-finding methods, inasmuch as the legislature or administrative precedents suggest what weight should be accorded the various interests (p. 152) (footnote omitted).

Unsurprisingly, the third attempt to provide a prescriptive framework overemphasizes the positive norm of expertise, a result which Edley finds "unappealing" (p. 162). Finally, a "pragmatic" approach does little more than replicate the confusions in the case law (p. 167).

One could argue that Edley has himself become the prisoner of the very categories he seeks to reject. He remains influenced by the rhetoric of the separation of powers and can only see government in terms of triangles. This produces a blurred conflation of concepts that might better be kept distinct.

Let us begin with the paradigm of politics. Several years ago I had an article translated into French⁴ and was surprised to discover that the French word for politics, *politique*, is also the French word for policy. While this limitation in the French language may reflect something about the nature of the French political system, using the same word for both concepts seems to prejudice a difficult issue. Edley, however, engages in the same conflation of terms (p. 53). In one sense this conflation is irrelevant since he concludes that drawing sharp lines between categories is pointless (pp. 72-74, 184). Nevertheless, something important is overlooked by lumping together interest-balancing choices, or even majoritarian ones, with decisions made through policy analytic techniques designed to maximize net benefits. Edley has put into one box decisionmaking methods, such as cost-benefit analysis (which require a commitment to a set of substantive values), with others whose justification is procedural. Considerable analytic bite is lost by labeling as "political" both an agency study of the costs and benefits of acid rain and an agency decision to spread urban assistance funds over as many congressional districts as possible in order to improve the chances of additional funding.

This grouping also appears to condemn expert policy analysis as an oxymoron, a conclusion which seems directly counter to Edley's belief

3. See *Hudson River Fisherman's Ass'n v. Federal Power Comm'n*, 498 F.2d 827 (2d Cir. 1974); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

4. Rose-Ackerman, *l'Inalienabilité et la théorie des droits de propriété*, 12 REVUE DE LA RECHERCHE JURIDIQUE: DROIT PROSPECTIF 533 (1987). The article is a translation of Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

that judges should do more to evaluate the "soundness" of agency action (p. 221). Of course, I do not mean to deny that "political" factors, in the narrow sense, can influence the conclusions of a cost-benefit analysis or a risk assessment. Policy analysis is not an exact science, and judgments about such factors as the rate of discount or the monetization of non-traded costs and benefits can tilt the conclusions in favor of powerful groups. But such a politically motivated choice would be a distortion of the underlying principles of analysis, not something making it essentially the same as logrolling. Furthermore, one would need a rather different legislative structure than is presently available to argue that the Congress should be a producer rather than a consumer of policy studies.

Turning next to the paradigm of science, Edley notes that in "fundamental and immutable respects, science and bureaucracy are incompatible" (p. 56). Yet he includes both scientific expertise and public administration in the same box, linking "the scientific method and managerial efficiency" (p. 14). Edley places in one category a paradigm justified in terms of one kind of substantive outcome—the discovery of scientific truth—with another justified in terms of the effective accomplishment of set tasks on a large scale. These agency roles seem linked only by the observation that courts and legislatures are incompetent in both areas.

The final paradigm of adjudicatory fairness is also overinclusive. In introducing the concept, Edley emphasizes both procedural issues (consistency, reasoned elaboration, neutral decisionmakers, rights to hearings and confrontation) and substantive ones (law-finding) (p. 14). The hope of legal commentators is that the use of legalized procedures will produce legally correct results, but as Edley recognizes (p. 25), this is a proposition to be demonstrated—not a conclusion to be assumed. If one accepts that point, then one must ask whether adjudicative procedures are justified because people think them fair in and of themselves or because they are actually effective in producing valued outcomes.⁵ Once again, the exposition of the trichotomy is confused by the blurring of substantive and procedural values.

Finally, consider Edley's use of the institutional analogues in the trichotomy: legislatures, agencies, and courts. His focus, in typical separation of powers style, is entirely on government. Yet the interaction between private organizations and the government is of central importance to understanding the development of the modern administrative state. Agencies typically contract out for many of their scientific tasks and use private organizations to administer programs and provide services. Even the judiciary makes use of special masters who are lawyers

5. Suppose it could be shown that jury trials were more likely to convict innocent people than bench trials. Would the supporters of the jury nevertheless continue to support jury trials?

detailed from private practice to perform particular tasks. While Congress has increased its levels of staff and improved the quality of in-house expertise, it nevertheless continues to rely on outside interest groups for much of its information. A broader attempt to break down the traditional categories of administrative law would need to recognize the role of the private sector in performing the roles of factfinder, policymaker, and administrator.⁶

II

A HARDER LOOK?

While Edley prefers a radical reconstruction of the role of the courts, if that is not possible, he will support the more modest reform of "harder look" review (pp. 169-70). Such review would "take explicit account of the necessary interplay of decision making paradigms" (p. 170). One of its functions would be to encourage greater transparency in agency processes by promoting "forthright articulation of the true bases for agency choice, so as to deter misexecution and permit frank appraisal, by the public, of the quality and character of political processes and ideologies" (p. 206). Rather than having to characterize politically motivated decisions as based on expert judgment, agencies could admit to political influences and be reviewed on how effectively they took account of the range of affected interests (pp. 190-92). To Edley, "politics should be permitted . . . as the rational basis for choice among otherwise reasonable alternative constructions of the evidence or as the rational basis for a resource allocation decision concerning the desirability of further research" (p. 194).

In developing this idea, Edley is caught up by his own use of overinclusive categories. His linking of policy convictions with interest accommodation under the common rubric of politics forces him to separate *politics-as-preferences* from *politics-as-market* (pp. 184-85) in discussing judicial review. Both these labels seem to me unfortunate. The former equates a top official's attachment to a policy position derived from whimsy or an accident of upbringing with a position arising from the thoughtful application of some broad principle of social justice. Both are "preferences" to Edley. The latter creates the impression that interest group balancing is somehow like a market, "with the currency being electoral reward" (p. 185). Yet social choice theory teaches that this is untrue.⁷ The structures of political and market institutions are vastly

6. Further, the separation of powers applies not just to the three branches of the federal government, but also to the relationship between the federal government and the states. Traditional administrative law courses have spent little time on this relationship, but it too is crucial for a full evaluation of institutional competence.

7. For an accessible review of the field, see D. MUELLER, *PUBLIC CHOICE II* (1989).

different, and there is nothing equivalent to the two fundamental theorems of welfare economics in political life.⁸ That is, the political bargaining process need not produce efficient results and may weight individual interests in very different ways than the "market."

Conceding the distinction, Edley's use of the concepts of politics-as-preferences and politics-as-market is unconvincing. Why is the former "weak" and the latter "strong" (p. 185)? Why should courts be more willing to defer to the whimsy of an administrator than to a bargain hammered out by affected interests (pp. 185-86)? Edley's idea that interest group politics is essentially like a top administrator's individualized weighting of costs and benefits⁹ is problematic. True, an agency executive may sometimes make a decision by trying to imagine the bargain that would have been made by the relevant groups, but Edley means to include more than this in the politics-as-preferences concept. Also included is the administrator who argues from first principles to a result (p. 184). Similarly, politics-as-market, or as I would prefer to call it, politics-as-bargain, does not necessarily involve a tradeoff among all those affected. After all, the essence of democratic choice is the use of voting rules that require less than unanimous consent. In the legislature, political choice need not improve everyone's lot. Why should it need to do so in the executive branch? Once one contrasts deductive arguments from first principles with a political process based on voting, the difference becomes one of kind, not, as Edley asserts, of degree (p. 186).

I do, however, agree with Edley that courts should not necessarily be more deferential in the case of politics-as-preferences than in the case of politics-as-market (p. 186). I differ with him mainly in seeing the possibility of significant differences in the appropriate standard of review, depending upon whether the administrator claims to have reached a reasoned decision in the face of competing principles or whether the agency claims to have reached a political accommodation.

Edley concludes his discussion of modest reforms with a list of unexceptional proposals for agency policymaking in the light of scientific uncertainty and conflicts of interests and values (pp. 209-12). He favors greater disclosure of the methodology used to make choices, arguing both for "the rationalizing force of reasoned elaboration" and "the constraining force of public scrutiny" (p. 210). He also argues for a weak rational choice standard, urging "a rule of presumptive desirability of

8. The two fundamental theorems of welfare economics demonstrate that a competitive equilibrium is Pareto optimal (efficient) and that every Pareto efficient point can be supported by a competitive equilibrium. For a discussion, see A. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 39-63 (1980).

9. "If raw ideological preferences are permissible, then so is an electoral marketplace, in principle. There remains only the question of degree" (p. 186) (emphasis in original).

quasi-adversarial processes" that would "place a burden of persuasion on an agency unwilling to design ad hoc procedures of some sort to expose and resolve important disputes amenable to expert debate" (p. 211).

III SOUND GOVERNANCE

Having made obeisance in the direction of incrementalism, Edley is now ready for a more unconstrained exploration of alternatives. He is, however, still stuck with his triangles, only now the three factors are not pulling against one another but, in his ideal world, are playing together as a trio (p. 222-23). He seems not to have considered the possibility that the administrative state might better be described as a quartet or even a quintet, and he mixes up concepts as different in kind as bowing techniques, repertoire selection, and violin production.

In pushing his thesis to its logical limits, Edley's speculation focuses on the norm of "sound governance" (p. 213). But what does he mean by this? Is this concept anything more than the avuncular intoning of pious hopes? I think it is *something* more than that, but Edley's exercise in norm construction is fundamentally incomplete.

Edley's notion of sound governance takes the following form. First, the three decisionmaking paradigms should be integrated and ably executed (p. 213). Second, judicial review should assure this result (p. 213). The courts would have a quasi-hierarchical position vis-à-vis agencies, but both the agencies and the legislature would be able to correct "judicial errors" (pp. 214-15). Edley uses the image of partnership, but recognizes its limitations (pp. 214-15). Third, "the specific content of sound governance must be defined in an evolutionary process that involves all branches of government and the public" (p. 213). Unfortunately, this evolutionary idea, with its Darwinian overtones, is articulated so vaguely as to undermine the rest of the formulation.

Edley begins by pointing out that administrative law's obsession with agency discretion is anachronistic and irrelevant to the project of promoting sound governance (pp. 215-17).¹⁰ Bureaucrats are not merely technical implementers but are "full partner[s] in the lawmaking and policy-making activity of government" (p. 218) (citation omitted).

With this characterization of agency officials in mind, Edley seeks to have administrative law play a more active role in promoting policy innovation, to assure sound governmental decisionmaking (p. 221). He points to scholarship that advocates quasi-market incentives in pollution, that evaluates regional authorities for water pollution control, and that

10. In support of this claim, Edley observes that schools of public policy rarely even consider the concern with discretion that animates administrative law (p. 217 n.4).

seeks to incorporate "noncommodity values" as examples of implicit recognition of the importance of the content of public policy (p. 221). He views it as a hopeful sign that some legally trained analysts have proposed such substantive policy innovations (p. 222 n.16).

In his view, the courts will not be able to foster innovation, however, unless they refrain both from pigeonholing problems and from pigeonholing themselves (p. 223). By no means are they to become mere technocrats, although Edley does propose that judges receive better training in the techniques of policy analysis and the scientific method (p. 239). The goal is for courts to require agencies to balance politics, expertise, and adjudicatory fairness and for courts to "evaluate the quality of agency activities in each of these three respects" (p. 225). Agencies, in turn, must "frankly acknowledge the role of political, ideological, or subjective analyses" and be open and explicit about the factors (scientific, political, and law-based) that influenced their decisions (pp. 190-91).

Even though Edley does his best to be noncommittal in articulating norms of sound governance, he does not entirely succeed. In fact, he seems quite set on having courts require rationality, even asking rhetorically if agencies can be said to have a "prerogative to act with doubtful rationality" (p. 231). While he supposes that an evolutionary process will develop norms over time, he proposes that, as a start, existing norms be used. To illustrate his point, he presents an example of a judicial challenge to a regulation governing use of a hazardous chemical in the workplace where the evidence is uncertain and there are powerful groups on each side. His heavily hedged proposal for judicial action is as follows:

I would not object to a court requiring the agency to evaluate regulatory alternatives using cost-benefit analysis or the Ames test for bacterial mutagenicity or to do so in terms of impact on each of several classes of affected individuals or firms. These matters seem substantive and certainly inappropriate for courts steeped in separation of powers ethos. But if a judge is persuaded that action without such analysis might well be unsound, the court should require it: When an accessible norm of sound decision making exists, or when the court can attempt to formulate one without prejudice to the power of agency or legislature to correct a judicial misconception, a conscientious judge should act on personal conviction (p. 231).

To make his trio play harmoniously, however, Edley recognizes that current judicial personnel and institutions must be reformed in order to assume their new roles with competence. Judges would need some retraining¹¹ and courts should "devise the requisite systems of intellectual and logistical support, including perhaps staff experts, broader

11. "Continuing legal education for judges, including special programs in economics, are but one example" (p. 239).

libraries, resort to expert amici, consultants, and so forth" (pp. 238-39). He further proposes that consideration be given to establishing specialized courts where judges do not have life tenure (pp. 247-50), and views structural injunctions with favor (p. 257).

All these specifics are canvassed quite quickly, yet they are in many ways the most interesting part of the book. The reader wants to know more. For example, even a passing acquaintance with dynamic models in the social and behavioral sciences ought to suggest that it is insufficient to point hopefully to "evolution." Some systems evolve into a steady-state trap; others unravel and collapse. Only under a limited set of conditions do dynamic systems move ever onward and upward. Edley has two tasks remaining now that he has demonstrated the aridity of current doctrine. First, he needs to specify what "up" is, in an evolutionary sense. Second, he must demonstrate that the institutional reforms he proposes will, over time, lead to desirable evolutionary trends. At times Edley seems to believe that the mere existence of gradual change is sufficient justification. But evils as well as goods can develop slowly, and if we cannot tell one from the other, how are we to know whether to rejoice or despair?

IV

FROM CRITIQUE TO CONSTRUCTION

My critique of Edley's work centers on his conflation of disparate categories and his failure to provide a convincing normative framework for analysis. As Edley himself has demonstrated, criticism is easier than construction, but I will nevertheless conclude by suggesting how an exercise in normative analysis might begin.

I have already indicated my discomfort with Edley's merging policy and politics. Here, I want to develop a further distinction between substantive policymaking and the implementation of policy in particular cases. These categories are not disjoint, since an agency can implement a statute through case-by-case adjudications which produce a pattern of precedents with policy content. Nevertheless, the distinction is central to my enterprise because I argue that different paradigms should govern.

For policymaking, agencies should seek to accomplish the goals of the statute at the least social cost, using procedures that permit interested citizens to evaluate agency action. Technocratic expertise should be balanced against the requirements of democratic accountability. When goals have been well specified in the statute, the agency should engage in cost-effectiveness analysis. Such an analysis considers not only budgetary costs, but also the costs imposed on private individuals and firms by public actions. The aim is to accomplish the public goal with the least use of society's resources.

When, as is usually the case, goals are not precisely specified in the statute and budgetary appropriations are limited, the agency should seek to balance benefits and costs to maximize net social benefits. The imprecision of the statute should give the agency leeway to evaluate both benefits and costs. When goals are stated broadly, funding limitations should force the agency to seek the most beneficial use of its scarce resources. Of course, cost-benefit analyses cannot always be carried out with precision. Analysts must recognize the importance of including unquantifiable harms and benefits and should sometimes avoid formal analysis because the key factors are too vaguely specified.

The pursuit of net benefit maximization does not necessarily mean that agencies should do cost-benefit analyses. In one case, a process like informal rulemaking under the Administrative Procedures Act—which combines consultation with balancing by top officials—may make sense. In another, a negotiated bargain between the affected interests may be more likely to produce a result that maximizes net benefits. In still another case, the agency might create incentives for private individuals and firms to act, without specifying a particular desired result. When private individuals and firms possess much of the information needed to develop sound policies, it may be best to give them incentives to reveal this information instead of centralizing analysis and decisionmaking in the agency.

Requiring agencies to maximize net benefits within statutory constraints does not imply a lack of concern for distributive justice. Rather, it reflects a principle of institutional competence. Individual regulatory statutes only affect a portion of the population. A policy that concentrates on distributing fairly the benefits and burdens of one statute may well be unfair to those who are excluded from the regulator's ken. If all agencies concentrated on fairness to the exclusion of efficiency, the result could make most people worse off and would surely be a crazy quilt of special purpose benefits that would be difficult to justify. People would be treated differently who differ only in whether or not they happen to come under the jurisdiction of a particular statute. To echo a familiar theme in public finance, redistribution policy should be accomplished through a general system of taxes and transfers, not piecemeal through the regulatory system. The basic function of the regulatory system in promoting distributive justice could be the provision of information about who has been hurt and harmed by its programs. This information, together with material on the basic policy choices of the agency, would form the basis for any legislative actions to change the agency's mandate or to develop counteracting compensation schemes.

Turning to implementation, however, I believe that the priorities should be quite different: here both substantive and procedural fairness

should dominate. Once the agency has set overall policy to maximize net social benefits under its enabling statutes, implementation should avoid favoritism and arbitrariness. Of course, everyone cannot be treated absolutely equally, but the agency should be able to articulate its principles of enforcement and should establish procedures permitting individuals to challenge implementation decisions. Administrative law's traditional concern with protecting individuals from state tyranny would become salient at this juncture. Constraints of time and money can appropriately limit agency behavior, but budget constraints operate here to limit the fairness of procedures, not—as in the policymaking area—to limit the achievement of efficiency goals. Implementation and policymaking are linked, however, since the more resources the agency invests in its implementation plan, the fewer it will have for policymaking. One implication of my emphasis on the distinction between substantive policy and fair implementation is a presumption in favor of agency rulemaking. The use of a series of adjudications to make policy runs the risk of confusing fairness to individuals with furtherance of broad policy goals.

In my formulation, then, substantive norms—not procedure—are central to policymaking. Only those procedural requirements that further openness have independent importance. The goal of such procedures is not fairness or an improvement in the quality of policy, but an increase in the government's accountability to voters. For implementation, in contrast, procedural fairness is a central goal which may be in tension with the achievement of policy goals.

The judiciary should evaluate policy, as they do today, for accord with statutory purpose. They should, however, as Edley himself recommends, consider substance even when agency discretion is allowed, by requiring the agency to make a plausible case that it has maximized net benefits subject to statutory, budgetary, and informational constraints. The courts would not examine procedures except to determine whether the process is sufficiently open to permit political accountability. In reviewing implementation actions, however, the procedural inquiry would be central in individual cases, and the courts would also hear claims that an agency's overall implementation practice was arbitrary and unfair.

My outline of the distinction between policymaking and implementation is in the spirit of Edley's effort. He too supports increases in policy analysis and greater openness in the executive branch. He also favors a judiciary more willing to examine substance while it at the same time remains unwilling to make policy itself. Although this sketch has raised more questions than it has answered, I hope that, along with Edley's own effort, it will begin a dialogue among administrative lawyers, policy analysts, and politically active men and women concerning the concept of

“sound governance”—a dialogue that perhaps can produce concrete suggestions for administrative law reform.